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In The

Supreme Court of the United States

October Term, 1990

RONALD ALLEN HARMELIN,

Petitioner,

vs.

MICHIGAN,

Respondent.

On Writ Of Certiorari To The Court Of Appeals Of Michigan

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

Page

Table of Authorities ii

Petitioner's Reply to Respondent's Argument 1

I. Individualized Sentencing 1

II. Newspaper Articles 3

Conclusion 5

TABLE OF AUTHORITIES

Page

CASES

Leary v United States, 395 U.S. 6 (1969) 3

Lockett v Ohio, 438 U.S. 586 (1978) 1

People v Cortez, 131 Mich. App. 316; 346 N.W. 2d 540 (1984) 2

People v Harman, 124 Mich. App. 93; 333 N.W.2d 591 (1983) 2

People v Lemble, 103 Mich. App. 220; 303 N.W.2d 191 (1981) 2

Solem v Helm, 463 U.S. 277 (1983) 1

Tot v United States, 319 U.S. 463 (1943) 3

STATUTES

M.C.L. § 333.7403 2

M.C.L. § 791.234 1

MISCELLANEOUS

Detroit Free Press, March 10, 11, and 12, 1990, at 1A ...4, 5

PETITIONER'S REPLY TO RESPONDENT'S ARGUMENT

I. Individualized Sentencing

Respondent does not adequately address Petitioner's argument that the mandatory aspect of the Michigan statute imposing what amounts to "civil death" is inconsistent with this Court's individual sentencing jurisprudence. Respondent's Brief at 25-27. It is Petitioner's position that what makes this statute unconstitutional is the complete *lack of discretion*, which forces the sentencing judge to impose this uniquely severe penalty, *Solem v Helm*, 463 U.S. 277, 297, 303 n.32 (1983), without an individualized sentencing determination.[1]

Respondent also ignores the fact that the facial harshness of this non-discretionary sentencing law has been exacerbated by the Michigan courts' interpretation of it.[2] First of all, a defendant's prior record is irrelevant under

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[1] Respondent apparently concedes that the application of *Lockett v Ohio*, 438 U.S. 586 (1978), and its progeny to noncapital mandatory minimum sentences is an open question. Respondent's Brief at 26 (citing *Lockett, supra*, 438 U.S. at 605 n.13).

[2] Respondent's Brief at one point implies that the life sentence at issue is parolable. Respondent's Brief at 25, n.12. In fact, Michigan's "lifer law," which provides for eligibility for parole after 10 years, expressly excludes the instant sentence. M.C.L. §791.234(4) ("A prisoner under sentence for life or for a term of years, *other than* prisoners sentenced for life for murder in the first degree and *prisoners sentenced for life or for a minimum term of imprisonment for a major controlled substance offense*, who has served 10 calendar years of the sentence is subject to the jurisdiction of the parole board and may be released on parole . . . ") (emphasis added).

this statute. *See People v Harman*, 124 Mich. App. 93, 103; 333 N.W.2d 591 (1983) (M.J.Kelly, J., dissenting). In addition, a large-scale dealer is treated the same as a mere aider and abetter. *See People v Cortez*, 131 Mich. App. 316, 333-334; 346 N.W.2d 540 (1984).

The purity of the controlled substance is also irrelevant. One who possesses a mixture containing one gram of cocaine and 649 grams of sugar must be sentenced to life without parole, while one who possesses 649 grams of pure cocaine may not be so sentenced.[3] *See People v Lemble*, 103 Mich. App. 220, 223; 303 N.W.2d 191 (1981). Finally, knowledge of the amount has been made irrelevant. If a defendant believed he was transporting one gram of cocaine, and it turns out the amount was over 650 grams, the judge must sentence him to life without parole. *See Cortez, supra*, 131 Mich. App. at 331. Hypothetically, if the next defendant to appear before the same judge was the head of a Medellin drug cartel charged with this statute, he must receive the same sentence as the unwitting defendant mentioned above. Such a result does not comport with this Court's individualized sentencing doctrine under the Eighth Amendment.

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[3] In fact, the defendant who possessed 649 grams of pure cocaine could be sentenced to probation. Under M.C.L. §333.7403(2)(ii), possession of less than 650 but more than 225 grams of a mixture containing cocaine carries a mandatory minimum of 20 years and a maximum of 30 years. Under M.C.L. §333.7403(3), however, "[t]he court may depart from the minimum term of imprisonment authorized under subsection (2)(ii) . . . if the court finds on the record that there are substantial and compelling reasons to do so."

Respondent in its brief assumes, and Petitioner wholeheartedly agrees, that this statute is designed for those who deal in large quantities of drugs. As stated in Respondent's Summary of the Argument: "Drug trafficking is one of the greatest dangers facing the United States. Michigan's mandatory penalty for those dealing in large quantities of drugs is not grossly disproportionate as a weapon in the national war on drugs." Respondent's Brief at 2. The Michigan legislature thus has made a finding that one who is found in possession of 650 or more grams of cocaine at some point is conclusively presumed to be a person who is "dealing in large quantities of drugs." The fact proven (possession of 650 or more grams at some point), however, does not provide a rational connection to the ultimate fact presumed (dealing in large quantities of drugs). This Court has consistently struck down these kinds of presumptions where there is no rational connection between the fact proven and the ultimate fact presumed. *See Leary v United States*, 395 U.S. 6, 30-53 (1969); *Tot v United States*, 319 U.S. 463 (1943). In fact, Petitioner's case is even stronger because in the above cases the presumption was rebuttable.

II. Newspaper Articles

In its brief Respondent cites to various articles from Detroit newspapers.[4] Respondent cites these articles in

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[4] Petitioner has filed a motion to strike Respondent's citation in its Statement of the Case to one newspaper article on the ground that it is improperly prejudicial. Respondent's Brief at 1, n.1. Petitioner has not so challenged Respondent's citations to two other newspaper articles cited in its Argument. Respondent's Brief at 20, nn. 8 and 9.

support of its arguments that drug defendants in general are deserving of mandatory life without parole,[5] and the Petitioner in particular is deserving of such punishment.[6]

Significantly, Respondent fails to cite a three part series of articles from one of the same newspapers, which reported on the operation of Michigan's mandatory life without parole statute. *Detroit Free Press*, March 10, 11, and 12, 1990, at 1A. Among the more pertinent conclusions of the study are: (1) the law has failed in its intent to capture drug "kingpins," instead ensnaring those at the lower levels of distribution[7]; and (2) over half of those sentenced under the statute had no prior felony record.[8]

Respondent repeatedly focuses on the facts of Petitioner's case, virtually ignoring that the instant case also involves a facial challenge to the mandatory aspect of the statute and not merely as applied to Petitioner. A broader, more representative discussion of the people to whom the statute has been applied can be found in the *Detroit Free Press* series of articles cited above.

For example, Ruth Bullock, a 50 year old grandmother with no prior record, is serving life without parole after picking up a friend at the airport whose bags contained cocaine.[9] Kafan Hana, who was 16 years old at the time of his offense, is serving the same sentence after

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[5] Respondent's Brief at 20, nn. 8 and 9 (citing *Detroit Free Press* articles).

[6] Respondent's Brief at 1, n.1 (citing *Detroit News* article).

[7] *Detroit Free Press*, March 10, 1990, at 1A.

[8] *Detroit Free Press*, March 11, 1990, at 7E.

[9] *Detroit Free Press*, March 10, 1990, at 4A-5A.

cocaine was found in his possession.[10] Petitioner agrees that many drug dealers deserve very harsh sentences. That decision, however, should be for the sentencing judge in the exercise of his discretion. As the above examples graphically illustrate, Michigan's *mandatory* statute sweeps with too broad a brush and therefore constitutes cruel and unusual punishment.

CONCLUSION

For the reasons set forth in Petitioner's Brief on the merits, as well as this Reply Brief, this Court should reverse the judgment of the Michigan Court of Appeals and remand for further proceedings.

Respectfully submitted,

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[10] *Detroit Free Press*, March 12, 1990, at 4A. Hana's attorney was quoted in the article as follows:

> "That law was meant to apply to kingpins and prosecutors were supposed to use discretion as to apply it to only certain defendants. There are different tiers and levels. Show me any kingpins that are caught? The kingpins run over to the federal building and give up someone in Miami and get seven years."